MOTION FILED
SEP 11 1987

No. 87-261

IN THE
Supreme Court of the United States
October Term 1987

PACIFIC GAS & ELECTRIC COMPANY,
Petitioner,
vs.
THOMAS TELLEZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AND TEXAS EMPLOYMENT LAW COUNCIL AS AMICI CURIAE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF OF THE CALIFORNIA EMPLOYMENT LAW COUNCIL AND TEXAS EMPLOYMENT LAW COUNCIL AS AMICI CURIAE IN SUPPORT OF THE PETITION

The California Employment Law Council (CELC) and the Texas Employment Law Council (TELC) (collectively "*amici*") hereby move, pursuant to Rule 36.1 of the Rules of this Court, for leave to file the attached brief *amici curiae* in support of the petition for certiorari. Consent to the filing of this brief has been obtained from counsel for petitioner.* Counsel for the respondent has withheld consent.

Amici are voluntary, nonprofit organizations composed of more than 100 members, employing more than 600,000 persons, representing a broad segment of the employer community in California and Texas. *Amici* were formed to promote the common interests of employers and the public in sound procedures and laws pertaining to employment practices. Petitioner Pacific Gas & Electric Company is not a member of CELC or TELC.

Many members of *amici* are parties to collective bargaining agreements. *Amici* are concerned about the disrupting and destabilizing impact upon employers, unions and employees, of allowing individuals covered by collective bargaining agreements to circumvent agreed-upon grievance machinery. No one, including an already overburdened court system, benefits from duplicative litigation in multiple fora. Accordingly, *amici* request leave to file this brief, and they urge reversal of the court of appeals.

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* A copy of the consent letter is being filed concurrently with the Clerk of the Court.

WHEREFORE, *amici* respectfully request that their motion be granted.

DATED: September 11, 1987

Respectfully submitted.

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BRIEF OF AMICI

INTEREST OF THE AMICI

Amici respectfully refer the Court to the description of their interest presented in the motion for leave to file brief, to which this brief is attached.

REASONS FOR GRANTING THE WRIT

This case presents a question that has hopelessly divided the courts of appeals and that this Court reserved last Term in *Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804, 4807 n.13 (June 9, 1987). The question is whether a worker covered by a collective bargaining agreement may sue in tort for the normal fare of alleged workplace wrongs, or whether the labor contract's grievance-and-arbitration procedure provides an exclusive remedy.

Amici believe that the Court implicitly resolved this issue, in favor of arbitration, in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). The disarray in the courts of appeals since then, however, demonstrates that this is an issue on which further guidance is needed.

I
FACTS AND SUMMARY OF POSITION

A. Facts.[1]

Although the facts are described in some detail in the petition, a brief summary helps underscore why review is needed. Contrary to the Ninth Circuit's view, the present

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[1] The facts are drawn from the Ninth Circuit's decision, 817 F.2d 536 (9th Cir. 1987).

dispute is not well suited for a tort jury; rather, it should be "grist in the mills of the [labor] arbitrators." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960).[2]

Petitioner Pacific Gas & Electric Company (PG&E) believed that it had a drug-trafficking problem among its employees. The company began to investigate, and an eyewitness reported that respondent Tellez had bought cocaine on company premises. In reliance on this information, the company suspended Tellez for ten days, and reported the suspension and the surrounding circumstances in a memorandum to eleven company managers.

Tellez, aggrieved by the suspension, responded exactly as his labor contract instructed: he filed a grievance. After a multistep grievance procedure, the matter was heard in binding arbitration. Notwithstanding the company's evidence, the panel upheld Tellez' claim. As a remedy, it ordered three things: (1) full back pay; (2) interest; and (3) expunction from company records of the suspension memorandum.

Not content with winning, Tellez then sued, complaining about his suspension and its effects under a variety of contract and tort theories. The district court dismissed the suit, but the Ninth Circuit reversed. The present petition for certiorari followed.

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[2] Arbitrations over drug use or drug distribution are too numerous to recount. *E.g.*, *Vulcan Asphalt Refining Co.*, 78 Lab. Arb. (BNA) 1311 (1982) (Welch, Arb.) (reinstating grievant discharged for off-duty drug sales); *New York City Health & Hospitals Corp.*, 76 Lab. Arb. (BNA) 387 (1981) (Simons, Arb.) (sustaining discharge for drug distribution); *AMF Inc.*, 69 Lab. Arb. (BNA) 987 (1977) (Kleeb, Arb.) (reducing to a suspension a discharge for drug distribution).

B. Summary of Position.

The Court should grant certiorari for two reasons. First, the Court needs to resolve a hopeless conflict in the circuits on the questions presented. The plight of the present *amici* helps illustrate the dilemma employers face. The members of *amicus* CELC do business in the Ninth Circuit, and thus must follow the Ninth Circuit's decision. By contrast, the members of *amicus* TELC, from the Fifth Circuit, are bound by *Strachan v. Union Oil Co.*, 768 F.2d 703 (5th Cir. 1985), which (as shown below) holds precisely the opposite. Indeed, many members of *amici* operate extensively in both (and other) circuits, and thus are trying — somewhat schizophrenically — to operate under inconsistent rules. Review is necessary to achieve clarity and uniformity in the law, which are particularly desirable given Congress' objective of developing a uniform federal law of labor contracts. *Allis-Chalmers*, 471 U.S. at 211.

Second, the Court should review — and reverse — the Ninth Circuit's decision because it subordinates grievance arbitration to tort jury trials. This is precisely backward. Congress itself identified arbitration as "the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." Labor Management Relations Act § 203(d), 29 U.S.C. § 173(d). And this Court for more than 25 years has held that grievance arbitration is an indispensable part of "a system of industrial *self*-government." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 580 (emphasis added). The Ninth Circuit has jarred these well-settled principles by substituting the tort jury for the labor arbitrator.[3] *Amici*

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[3] This Court has not previously considered the questions presented here. *Linn v. United Plant Guard Workers*, 383 U.S. 53, 61 (1966), held

(Footnote continued.)

respectfully suggest that this Court grant certiorari and reemphasize the primacy of arbitration in resolving workplace disputes.[4]

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that, under some exceptional circumstances, defamation claims were not preempted by sections 7 and 8 of the National Labor Relations Act ("NLRA"). *Farmer v. Carpenters*, 430 U.S. 290, 301-05 (1977), held that, under similarly exceptional circumstances, emotional distress actions could survive preemption under sections 7 and 8. Those decisions do not apply here. Both cases were brought by individuals against labor unions for extreme and outrageous conduct. Neither one was a suit, like the present one, in which an employee covered by a collective bargaining agreement sought to sue an employer over conduct already redressed in the grievance procedure. Thus, both *Linn* and *Farmer* involve only NLRA preemption — the doctrine of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). The present case, by contrast, involves the more far-reaching preemptive effect of section 301. *Allis-Chalmers*, 471 U.S. at 213-14 n.9 ("*Garmon* preemption [only] involves protecting the primary jurisdiction of the NLRB"; section 301 reaches farther because it flatly prohibits states from "provid[ing] a rule of decision where Congress has mandated that federal law should govern"). Thus, the Ninth Circuit correctly recognized that *Linn* and *Farmer* are inapposite here. 817 F.2d at 538 n.2.

[4] This case presents an issue very different from *Caterpillar* and four preemption cases in which the Court denied certiorari last Term: *Varnum v. Nu-Car Carriers, Inc.*, 804 F.2d 638 (11th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3775 (May 18, 1987); *Andersen v. Ford Motor Co.*, 803 F.2d 953 (8th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3583 (June 22, 1987); *Malia v. RCA Corp.*, 794 F.2d 909 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3837 (June 15, 1987); *Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 503 N.E.2d 308 (1986), *cert. denied*, 55 U.S.L.W. 3870 (June 26, 1987). In *Caterpillar*, the Court held that suits alleging breach of some preemployment contracts could not be removed to federal court. The Court did not, however, "intimate [a] view on the merits of . . . any of the preemption arguments" made in that case. 55 U.S.L.W. at 4807 & n.13. In all but one of last Term's cases, the issue was the enforceability of commitments made to someone to induce them to join (*Caterpillar*, *Andersen* and *Varnum*) or leave (*Malia*) the bargaining unit. *See Belknap, Inc. v. Hale*, 463 U.S. 491 (1983) (same). The other case, *Gonzalez*, involved a discharge allegedly in retaliation

(Footnote continued.)

II
REVIEW IS NECESSARY TO RESOLVE A HOPELESS CONFLICT IN THE CIRCUITS AND STATE SUPREME COURTS

The Court should grant certiorari because the Ninth Circuit's decision is totally inconsistent with the decisions in other circuits and at least one state supreme court.

A. This Court In *Allis-Chalmers* Emphasized The Primacy Of Arbitration Over Tort Jury Trials.

The starting point for analysis unquestionably is this Court's decision in *Allis-Chalmers*. In that case, an employee subject to a collective bargaining agreement sued his employer in tort, alleging "intentional[ ], contemptuous[ ], and repeated[ ]" wrongdoing. 471 U.S. at 206. The Wisconsin Supreme Court rejected the employer's preemption argument, relying essentially on the same rationale adopted by the Ninth Circuit in this case. The Wisconsin court asserted that the employee's suit did not arise under section 301 because "[u]nder Wisconsin law, the tort . . . is independent of [the] contract [claim]." *Id.* at 207.

This Court unanimously reversed. It held that the employee's state-law tort suit was preempted because "any attempt to assess liability here inevitably will involve

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for filing a worker's compensation claim. *See* 55 U.S.L.W. at 3870 (White, J., dissenting from denial of certiorari). None of those cases presented the question at issue here: whether a party covered by a labor contract can, by styling his complaint in tort, litigate garden-variety workplace disputes before both an arbitrator and a jury.

contract interpretation." *Id.* at 218. The court observed that, "[i]f the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations." *Id.* at 210. The contrary result "would cause arbitration to lose most of its effectiveness as well as eviscerate a central tenet of federal labor-contract law under § 301, that *it is the arbitrator, not the court,* who has the responsibility to interpret the labor contract in the first instance." *Id.* at 220 (emphasis added; citation omitted).

In light of these concerns, *Allis-Chalmers* set forth the test for section 301 preemption: A state-law claim is preempted whenever it "is inextricably intertwined with consideration of the terms of the labor contract," *id.* at 213, because "any attempt to assess liability . . . inevitably will involve contract interpretation," *id.* at 218.

B. The Lower Courts Now Are In Hopeless Disarray.

Despite the Court's unanimous decision in *Allis-Chalmers*, the lower courts have gone in many directions. A clear conflict exists on both the defamation and emotional-distress questions presented in this case. Further clarification is needed.

1. There is a clear conflict on the defamation issue.

Strachan v. Union Oil Co., 768 F.2d 703 (5th Cir. 1985), is flatly inconsistent with the Ninth Circuit's decision here. In *Strachan*, two bargaining-unit employees were suspected of using illegal drugs; both were suspended and subjected to medical tests. Word of the company's suspicions spread through the plant. When investigation failed to substantiate

the company's suspicions, the employees were reinstated with full back pay. *Id.* at 704, 706. They sued under a variety of tort theories, including defamation. The district court dismissed the suit on preemption grounds, *id.* at 704, and the court of appeals affirmed.

Focusing specifically on the defamation claim, the Fifth Circuit emphasized that management in the collective bargaining context of necessity must have the latitude, free from fear of tort litigation, to investigate and punish suspected misconduct.[5] That latitude of course is not without limits, but an employee's recourse must be through the grievance procedure, not in a tort jury trial. *Id.* at 705.

Similarly, in *DeTomaso v. Pan American World Airways, Inc.*, 43 Cal. 3d 517, 235 Cal. Rptr. 292 (1987), the California Supreme Court held preempted very similar defamation claims.[6] There, DeTomaso, a bargaining-unit employee, came under suspicion for theft. The airline investigated and ultimately confronted DeTomaso with its suspicions. In the course of the investigation, the allegations were repeated to certain third parties. *Id.* at 530-31. DeTomaso ultimately was terminated for "fraud, dishonesty and abuse of company policy." *Id.* at 523. DeTomaso grieved under the collective bargaining agreement and obtained a favorable settlement, including reinstatement,

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[5] The court of appeals explained:

> To hold the company guilty of defamation for making such inquiries, even though they became known in the plant, would simply mean that the company could never undertake to investigate a possible disciplinary situation in routine and proper ways . . . .

768 F.2d at 706.

[6] Pan Am, an airline, of course is covered by the Railway Labor Act rather than the LMRA. The California Supreme Court appeared to recognize that the same general preemption principles apply. *Id.* at 528 (citing *Allis-Chalmers*).

back pay and expunction of the allegations from company files. *Id.*

Meanwhile, however, DeTomaso had sued in state court under a variety of tort theories, including defamation and infliction of emotional distress. A jury awarded $565,000 in damages. *Id.* at 524.[7] On appeal, the California Supreme Court held the action preempted:

> *The parties to [a collective bargaining] agreement must be allowed to perform their duties without judicial interference in all but the most outrageous of cases. . . .* For the jury or a court to second guess whether the required investigation was "reasonable" under the circumstances here would undermine the exclusiveness of those procedures.

Id. at 530 (emphasis added).

Strachan, DeTomaso and several district court cases[8] are flatly contrary to the Ninth Circuit's decision here.[9]

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[7] The trial court ordered a remittitur to $207,000, or in the alternative a new trial on damages. *Id.* at 524.

[8] *E.g., Scott v. General Motors Corp.*, 645 F. Supp. 914, 916 (E.D. Mo. 1986) (dismissing defamation claim because "[t]he preclusive effect of § 301 . . . extends beyond suits alleging contract violations; it also affects state law tort claims"); *Gregory v. Simon Brothers, Inc.*, 640 F. Supp. 1252, 1256 (N.D. Ind. 1986) (preemption found because "the allegations of defamation are inextricably bound" to the labor contract); *Green v. Hughes Aircraft Co.*, 630 F. Supp. 423, 427 (S.D. Cal. 1985) (theft allegations; "countenance of the instant [defamation] claim would impinge upon the primary federal labor policy favoring the expeditious resolution of labor disputes by private grievance/arbitration").

[9] This Court should not regard the Ninth Circuit's decision as an aberration that can be ignored. The Court of Appeals for the Seventh Circuit very recently relied on the Ninth Circuit's decision here. *Keehr v. Consolidated Freightways, Inc.*, 825 F.2d 133 (7th Cir. 1987) (privacy claim is not preempted).

2. There also is a clear conflict on the emotional-distress issue.

The Ninth Circuit's decision also conflicts with other circuit decisions on the emotional-distress issue. The present panel (Pregerson, Choy and Goodwin, JJ.) concluded that the tort survived because it was based on "rights and duties independent of the employment relationship," and that "to decide the claim a court need not refer to the labor agreement." 817 F.2d at 539.

Many cases hold to the contrary. For example, in *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), the court (Wisdom, Wallace and Anderson, JJ.) declared numerous torts preempted, including infliction of emotional distress. In that case, a union welder alleged that his former employer "engaged in outrageous and unprivileged conduct with the intent of harassing him and causing him emotional distress." *Id.* at 1475. The court noted that the alleged wrongful acts all stemmed from disputes concerning employment or work conditions, most of which disputes tracked grievances that had or could have been processed under the labor contract. *Id.* at 1476. His tort claims, therefore, were preempted; his "exclusive remedies lay under the grievance procedures of the collective bargaining agreement and in federal remedies for retaliatory discharge." *Id.*

The Court of Appeals for the Tenth Circuit held essentially the same thing in *Viestenz v. Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir.), *cert. denied*, 459 U.S. 972 (1982). There, an employee sued for wrongful discharge and infliction of emotional distress. The district court allowed the latter claim to proceed, but the court of appeals reversed. It held:

> If the pleading of emotional injury permitted aggrieved employees to avoid the impact of

> [federal law], the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes . . . without resort to the courts, would be thwarted.

Id. at 704 n.4, *quoting Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978).[10]

Several other circuit[11] and many district-court[12] cases

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[10] *Viestenz*, a pre-*Allis-Chalmers* case, probably confused its analysis somewhat by relying in part on cases applying the *Garmon* preemption doctrine. *See, e.g.*, 681 F.2d at 702-03. But the result under section 301 preemption analysis follows *a fortiori*. *Allis-Chalmers*, 471 U.S. at 213-14 n.9 (*Garmon* requires a balancing test; section 301, by contrast, preempts absolutely claims that fall within its reach). *See* note 3 *supra*.

[11] *E.g., Truex v. Garrett Freightlines, Inc.*, 784 F.2d 1347, 1353 (9th Cir. 1985) (emotional-distress claim preempted; "argument that the remedies available to [plaintiffs] through arbitration (reinstatement and back pay) would not compensate them for their emotional distress is . . . meritless"); *Carter v. Smith Food King*, 765 F.2d 916, 921 (9th Cir. 1985) (emotional-distress claim preempted because it "arose out of the same acts and conduct which formed the basis of [plaintiff's] section 301/breach of duty claims"); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425, 429 (9th Cir. 1983) (claims are preempted; "the critical inquiry is whether the controversy (the harassments) was identical to or different from" the wrongful acts alleged in arbitration).

[12] *E.g., United Auto Workers v. Park-Ohio Industries, Inc.*, No. C 85-1761 (N.D Ohio May 1, 1987) (emotional distress claims are preempted); *Weidner v. General Battery Corp.*, No. 86-3555 (E.D. Pa. April 9, 1987) (emotional distress claim is preempted even though plaintiffs "have already pursued their contractual remedies and now seek further relief"; even though one plaintiff "is not seeking relief for contractual violations, but rather for his physical injuries"; and even though plaintiff "now seeks additional relief which the arbitrator is unable to provide"); *Mann v. Georgia-Pacific Corp.*, 651 F. Supp. 580, 582 (E.D. Ark. 1986) (emotional-distress claim is preempted because plaintiff's claim is "dependent upon the terms of the collective bargaining agreement").

hold similarly. There is a clear conflict that should be resolved.[13]

C. In Light Of *Caterpillar*, There Is A Particular Need For This Court To Grant Review.

In *Caterpillar*, the Court held that, whatever the merits of preemption as a *defense*, many putative state-law claims normally were not subject to removal. 55 U.S.L.W. at 4807 & n.13.[14] The burden of the preemption inquiry, therefore,

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[13] The Ninth Circuit purported to distinguish *Olguin* on the ground that the collective bargaining agreement in the present case was "silent on work conditions, and vague on disciplinary formalities. It neither requires nor regulates suspension letters." 817 F.2d at 539. This is a distinction without a difference. The Ninth Circuit, before finding preemption, would seem to require a contract clause that says, "The company shall have the right to disseminate among members of management the results of disciplinary investigations." Of course, no collective bargaining agreement contains such detail. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. at 579 (emphasizing the arbitrator's broad latitude, and holding that "[o]ne cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages").

[14] In the present case, Tellez sued in state court, alleging breach of a contractual covenant of good faith and fair dealing, infliction of emotional distress, and defamation; PG&E then removed the case to federal court. The posture of this case differs from *Caterpillar* in several respects. Unlike *Caterpillar*, this case was removed largely in reliance on the covenant claim, which is implied in the employment contract — the collective bargaining agreement. Thus, the case at bottom is a suit arising under section 301. (Indeed, in the Ninth Circuit, Tellez conceded that the case was properly removed. 817 F.2d at 537.) *Caterpillar*, by contrast, involved claims that expressly were *not* based on the collective bargaining agreement. If, however, the Court were to believe that the federal court in this case lacked removal jurisdiction, it should grant the petition, vacate the Ninth Circuit's decision, and remand the case for reconsideration in light of *Caterpillar*.

increasingly will fall to the state courts. *See id.* at 4807. That being so, there is even more urgency in granting review here. The federal courts, which presumably are the most attuned to questions of federal law, themselves are in hopeless conflict on the preemption question. As the bulk of the litigation moves to state courts, confusion is certain to proliferate unless this Court grants certiorari.

III
THE COURT SHOULD GRANT CERTIORARI TO REEMPHASIZE THE PRIMACY OF ARBITRATION IN RESOLVING WORKPLACE DISPUTES

A. Arbitration Is The Method Of Choice For Resolving Day-To-Day Workplace Disputes.

Arbitration must displace tort jury trials where, as here, the allegedly wrongful conduct arises directly out of the investigation of suspected misconduct or poor performance, or the processing of discipline or grievances flowing from such an investigation.[15] For collective bargaining to work, employers must have reasonable latitude to act. Federal law must provide a measure of breathing space for employers to administer collective bargaining agreements — and, within reasonable bounds, even to make mistakes in doing so — without being haled before tort juries bent on "dispens[ing] [their] own brand of industrial justice." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

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[15] *Amici* do not, of course, suggest that federal law preempts every defamation of, or infliction of emotional distress upon, a bargaining-unit employee. The Court need resolve only the narrow issue presented by the routine factual scenario here. Certainly there may be cases in which an employer or supervisor so far exceeds the course and scope of employment as to sever the nexus to the collective bargaining agreement.

Tort litigation is not well suited to the workplace. The California Supreme Court noted very recently that employer-employee conflicts *routinely* arise out of "demotions, promotions, criticism of work practices, and frictions in negotiations as to grievances"; these are "a normal part of the employment relationship." *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 160, 233 Cal. Rptr. 308 (1987).[16] Federal labor law cannot abide a situation in which every discipline or discharge arbitration can be recast as a state-law tort, with the outcome dependent upon diverse juries' varying assessments of reasonableness, privilege and the like.[17] As the Fifth Circuit

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[16] As this Court has observed, "The potential for undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalitites that may be commonplace in various labor contexts." *Farmer v. Carpenters*, 430 U.S. at 305-06.

[17] The case for preemption perhaps would be less compelling if state courts had a coherent and consistent law of privilege. But the privilege cases are all over the map. Some states recognize an absolute privilege for statements made in at least some grievance proceedings. *E.g., Surrency v. Harbison*, 489 So. 2d 1097 (Ala. 1986); *Kloch v. Ratcliffe*, 221 Neb. 241, 375 N.W.2d 916 (1985); *Sturdivant v. Seaboard Service System, Ltd.*, 459 A.2d 1058 (D.C. 1983). Other states apply only a qualified privilege. *E.g., Ezekiel v. Jones Motor Co., Inc.*, 374 Mass. 382, 372 N.E.2d 1281 (1978); *Henthorn v. Western Maryland Railroad Co.*, 226 Md. 499, 174 A.2d 175 (1961). Several cases, although not finding preemption, seem to apply a federal common law of privilege to state tort claims. *E.g., Hasten v. Phillips Petroleum Co.*, 640 F.2d 274 (10th Cir. 1981); *General Motors Corp. v. Mendicki*, 367 F.2d 66 (10th Cir. 1966); *Barnes v. Avis Rent A Car System, Inc.*, 466 F. Supp. 907 (D.D.C. 1979). And some courts, like the Ninth Circuit in the present case, muddle the distinction between privilege and preemption. 817 F.2d at 538 n.3 (citing the law of privilege in an effort to distinguish a preemption precedent cited by PG&E).

Moreover, privilege is not a satisfactory substitute for preemption for at least three additional reasons. First, some of the privilege cases turn on whether the defamatory statement was made in a formal grievance

(Footnote continued.)

has held, a plaintiff should not be able to create

> major state court claims out of matters which are all part of . . . grievance procedure[s] ending in binding arbitration. *To hold otherwise in this case would subject thousands of grievance procedures involving disciplinary investigations and disciplinary actions . . . to lawsuits asserting state court claims.* . . . [Without preemption,] the critically important aspect of collective bargaining which is involved in the establishment of the grievance procedure . . . would be destroyed.

Strachan v. Union Oil Co., 768 F.2d at 705 (emphasis added).

This case well illustrates why tort jury trials should not be injected into the collective bargaining system. In support of respondent's claims, he alleges as "wrongful acts" only that (1) the PG&E security department investigated on-the-job drug use by interviewing several employees (Complaint ¶¶ 6-9); (2) the results of the investigation were shared within management (*id.* ¶ 24); and (3) respondent was suspended for ten days as a result (*id.* ¶¶ 10-11). The first two allegations simply cannot be actionable if employers are to have any leeway to investigate suspected employee misconduct; the third allegation was fully redressed in the grievance procedure. *Everything alleged is either a routine incident of life in the workplace or something susceptible to resolution in arbitration.* If this

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meeting. The doctrine thus offers incomplete protection to managers investigating misconduct and processing grievances. Second, and in any event, the privilege defense often cannot be raised on the face of a complaint. Only preemption disposes of suits effectively at the threshold. Third, the privilege issue in most cases is tried to a jury. Even if privilege law were consistent — which it is not — the vicissitudes of the jury-trial process are incompatible with federal labor policy.

presents a state-law jury question, as the Ninth Circuit held, then state law can have no place here.[18]

This Court in *Allis-Chalmers* warned the lower courts to reject crafty pleadings that "restate[ ] as . . . tort claim[s]" the "whole range of disputes traditionally resolved through arbitration." 471 U.S. at 219. Yet, under the lower-court panel's view of preemption, it is hard to conceive of an arbitration that could not be recast as a tort by interlarding the complaint with boilerplate allegations of malice, spite, suffering and distress.

This is *not* a "labor vs. management" dispute. Labor and management certainly have their differences, but the scope of section 301 preemption generally is not one of them. Labor and management — and individual employees — share a common interest in the fast, inexpensive and fair procedure that arbitration offers.[19] But tort trials in many

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[18] It would be anomalous to deny management leeway to conduct thorough investigations and deliberations in disciplinary cases. Collective bargaining agreements typically impose "just cause" limitations on discipline and discharge. It is *presumed* that management will not impose discipline in the absence of a thorough factfinding in advance. *E.g.*, F. Elkouri & E. Elkouri, *How Arbitration Works* 673 (4th ed. 1985) ("the failure of management to make a reasonable inquiry or investigation before assessing punishment [often is] a factor (sometimes the sole factor) in the arbitrator's refusal to sustain the discharge or discipline") (citing numerous cases). Thus, the Ninth Circuit's holding places management between a rock and a hard place. Employers must carefully investigate and deliberate to win in arbitration, but they risk tort liability for doing so.

[19] The Court often has praised arbitration for its speed and efficacy. *E.g.*, *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 558 (1964) ("the prospect of a speedy arbitrated settlement of the dispute" and the elimination of the "increased costs" of litigation, fulfill "the aims of national labor policy"); *Bailey v. Bicknell Minerals, Inc.*, 819 F.2d 690, 691 (7th Cir. 1987) (the "arbitration clause in a collective bargaining agreement is supposed to ensure speedy resolution of disputes"; the court

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California state courts take place *five years* after the filing of a complaint. *See generally Minkin v. Levander*, 186 Cal. App. 3d 64, 73, 230 Cal. Rptr. 592 (1986) (noting "the law explosion and the resulting backlog of cases in the [state] courts"). Allowing workplace disputes to fester for years before resolution is incompatible with sound collective bargaining.[20] The grievance-and-arbitration process simply cannot be subordinated to tort jury trials.

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bemoans the "depressingly large number of recent cases" brought by persons to circumvent arbitration).

[20] Indeed, employers will have very little incentive to enter into collective bargaining agreements and submit to grievance arbitration if they still must defend themselves in court as a result of activities reasonably related to discipline and grievance processing. One of California's leading union lawyers made the point eloquently last year:

> Once individuals may, in the collective bargaining context, bring wrongful termination cases and call them outrageous conduct, call them intentional infliction of emotional distress, *the result is you've said to the employer and the union, "Why have arbitration?"*
>
> *DeTomaso* is the perfect example. He got a full remedy in a grievance procedure, a reinstatement with backpay, so he sued only for emotional distress and for defamation . . . [He won] almost $200,000 in damages, . . . through a lawsuit. *It renders the grievance procedure a nullity and an employer's going to say to the union, "Why should I agree to it?"*

Proceedings of the 1986 Southern California Labor Law Symposium (remarks of David Rosenfeld), *reprinted in* 9 I.R.L.J. 1, 24 (1987) (emphasis added).

B. The Ninth Circuit's Opinion Reflects Confusion About The Nature Of Arbitration And The Judicial Role In Labor Contract Interpretation.

The Ninth Circuit purported to accept the general principles set forth above, but held that tort suits such as this one involve issues entirely separate from those that could be raised and remedied in the grievance-and-arbitration procedure. 817 F.2d at 839. The court of appeals was wrong in two respects. First, arbitrators can and do consider allegations precisely like those at issue here, and they can provide a remedy. Second, and more fundamentally, by prejudging the likely outcome of such a claim in arbitration, the court of appeals violated this Court's oft-repeated command to let arbitrators, not judges, interpret labor contracts.

1. Arbitrators can and do hear and resolve claims like those brought by respondent.

The court of appeals erred in stating that arbitrators cannot resolve disputes, or consider remedies, similar to those at issue here.[21] The specific arbitration clause in this case contains a broad delegation of authority.[22] It also

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[21] *See* note 2 *supra*. In addition, as union attorney Rosenfeld put it:

> [D]on't forget that when it comes to that arbitration, we have the right to ask [arbitrators] *not only for backpay and reinstatement but for damages for infliction of emotional distress and for punitive damages.* It's not a usual remedy, but there's nothing [absolute] about it.

9 I.R.L.J. at 25 (emphasis added).

[22] The contract provides:

> [M]utual resolution of disputes through a collectively bargained grievance process is the hallmark of competent

(Footnote continued.)

explicitly empowers *the arbitrator* to resolve even the threshold question of "whether a matter is a proper subject for the grievance procedure." Art. 102.2. Thus, in concluding as a matter of law that an arbitrator could not consider certain claims, the court of appeals plainly erred.[23]

2. The court of appeals exceeded its jurisdiction by purporting to interpret the contract in place of the arbitrator.

The court of appeals not only evaluated incorrectly what claims an arbitrator could consider; the court's primary error was undertaking that inquiry at all. Just last year, the Court reminded lower courts that they "*have no business* weighing the merits of the grievance, . . . or *determining whether there is particular language in the written*

> industrial self-government. Therefore, apart from those matters that the parties have specifically excluded [from arbitration], *all disagreements shall be resolved within the scope of the grievance procedure.*

Art. 102.1 (emphasis added).

[23] The whole point of collective bargaining is that employers and unions can establish whatever kind of dispute-resolution system — and whatever remedies — they desire. That is why the court of appeals was wrong even assuming, *arguendo*, that Tellez could not obtain certain remedies under the collective bargaining agreement. As this Court has recognized, the possible existence of differing remedies under federal and state law is precisely why the preemption doctrine exists. *See Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. ___, 555 U.S.L.W. 4471, 4474 (April 7, 1987) ("the powerful pre-emptive force of § 301 of LMRA displace[s] all state actions . . . even when the state action purported to authorize a remedy unavailable under the federal provision"); *San Diego Building Trades Council v. Garmon*, 359 U.S. at 246-47 ("[o]ur concern is with delimiting areas of conduct that must be free from state regulation if national labor policy is to be left unhampered. . . . Even the States' salutary effort to redress private wrongs or grant compensation for past harm" may reach too far into a protected sphere).

instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 54 U.S.L.W. 4339, 4341 (April 7, 1986) (emphasis added), *quoting United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960).

The court of appeals thus was fundamentally wrong. It correctly acknowledged that a tort claim will be preempted if " 'evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.' " 817 F.2d at 537, *quoting Allis-Chalmers*, 471 U.S. at 213. However, the court of appeals then did what it acknowledged it should not do: it considered the terms of the labor contract and concluded that respondent's claims were not cognizable under it.[24] What the court failed to recognize is that, by finding it necessary to perform that inquiry, it usurped the arbitrator's role and decided for itself what the contract provided and what the parties contemplated. The court of appeals' opinion thus inadvertently makes the case for preemption. As this Court held in *Allis-Chalmers*, preemption exists where, as here,

> *the* [*lower*] *court based* [*its analysis*] not solely on its . . . understanding of the state tort, but also *on assumptions about the scope of the contract provision which it had no authority to make* . . . . The assumption that the labor contract creates no implied rights is not one that [the courts] may make.

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[24] The court of appeals reasoned that "[t]he agreement simply does not govern" the tort claims; "its grievance mechanism is not equipped to redress [them]"; under the contract, "the grievance committee [had] no authority to decide whether PG&E had acted outrageously"; and "it could provide no remedy for such behavior." 817 F.2d at 538-39.

Id. at 214-15 (emphasis added).[25]

IV
CONCLUSION

The Court should grant the petition to resolve the conflict in the circuits and to reaffirm that arbitration, not tort litigation, is the method for resolving disputes involving employees covered by collective bargaining agreements.

In the alternative, if the Court were to believe that the lower federal courts lacked jurisdiction, the Court at a minimum should grant the petition, vacate the judgment below, and remand to the Ninth Circuit for reconsideration in light of *Caterpillar*. *See* note 14 *supra*.

DATED: September 11, 1987

Respectfully submitted.

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[25] *Cf. Hasten v. Phillips Petroleum Co.*, 640 F.2d at 279 (libel action not cognizable because it "clearly call[s] for adjudication of the merits of the allegations of dishonesty which were the core issue in the grievance proceeding").